U.S. Department of Labor

Office of Administrative Law Judges
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Date Issued: May 16, 2000

Case No.: 1999-LHC-2065

OWCP No: 08-113346

In The Matter of

JIMMY R. CASTRO,
Claimant

v.

TESORO PETROLEUM DISTRICT CO.,
Employer

and

BANKERS INSURANCE CO.,
Carrier

APPEARANCES:

PONCHO NEVAREZ C., ESQ.,
On Behalf of the Claimant

CHRISTOPHER LOWRANCE, ESQ.,
On Behalf of the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Jimmy R. Castro (Claimant) against Tesoro Petroleum District Co. (Employer) and Bankers Insurance Co. (Carrier). The formal hearing was conducted at

Corpus Christi, Texas on February 1, 2000. Each party was represented by counsel, presented documentary evidence, examined and cross-examined the witnesses, and made oral arguments. The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-3, and 8-32[1], and Employer's Exhibits 1-10. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Jurisdiction is not contested;

2. An injury/accident occurred on or about July 16, 1997, in which Claimant sustained plantar fascia (inflammation of tissue) to both feet;

3. An employer-employee relationship existed at the time of the injury;

4. The plantar fascia injury occurred in the course and scope of employment;

5. Employer was notified of the injury on July 16, 1997;

6. A Notice of Controversion was filed on July 29, 1997;

7. An informal conference was held on December 16, 1997; and

8. Claimant has received disability benefits for 37 1/7 weeks at various rates from July 17, 1997, to April 3, 1998, for a total of $15,860.91.

Unresolved Issues

The unresolved issues in this case are:

1. Causation of Claimant's flat feet condition;

2. Claimant's average weekly wage;

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[1] Claimant's exhibits 4 - 7 were rejected.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Joint Exhibit - "JX __, pg. __"; Employer's Exhibit - "EX __, pg. ___"; and Claimant's Exhibit - "CX __, pg. ___".

3. Nature and extent of Claimant's disability, including whether or not Claimant has reached maximum medical improvement; and

4. Claimant's entitlement to medical benefits.

Statement of the Evidence
Testimonial Evidence

Jimmy Ray Castro, Claimant

Mr. Jimmy Castro, 41 years of age at the time of the hearing, testified that in 1996 he was hired by Employer as a rigger operator. According to Claimant, his position as a rigger operator was very physical, involving prolonged standing, and jumping back and forth from boats and on and off of equipment, for well over a majority of his shift, which usually lasted from 12 to 15 hours a day. While Claimant stated he initially earned $7.15 an hour, he eventually received a raise to $8.15 and received overtime. Additionally, Claimant testified that one of his benefits included participation in a flex plan which he understood could be used as a savings plan or to buy insurance for his family, and that Claimant chose the latter.

Claimant testified that, although he began experiencing pain in his feet in February or March, 1997, he failed to make a formal report to his Employer until July, 1997. It was around this same time Claimant stated he was terminated by Employer for non-injury related reasons which were not an issue in this case. Claimant denied experiencing any previous pain in his feet prior to his employment with Tesoro.

Claimant testified that after reporting the pain in his feet, he was examined by Dr. Edwardson, his family physician, who diagnosed plantar fascitis, or inflammation of the foot tissues. Claimant stated that when his foot pain continued, he visited Dr. Lawrence Wilk orthopedic surgeon, on October 24, 1997, who informed him that he was born with flat feet, a condition for which there is no cure. However, Dr. Wilk explained that there were treatments for the condition and recommended Claimant obtain lace-up boots with arch supports to limit the symptoms often produced by flat feet.

Claimant stated Employer paid for his medical expenses with Dr. Wilk, including his prescriptions and arch supports. However, Claimant testified Employer refused to pay for his boots. Claimant acknowledged that he had worked heavy labor most of his life and that the majority of employer's required steel toed boots which employees were responsible for purchasing on their own, but testified that prior to his foot complaints he used slip on boots, and that now, his condition requires lace-up boots to better support his ankles. Additionally, Claimant testified that none of his previous employers required him to work on his feet for 12 to 15 hour days.

According to Claimant, following his termination with Employer, on September 12, 1997, he obtained employment with M-I Drilling Fluids, where he was employed until January 31, 1998. Subsequently, on February 13, 1998, Claimant testified he obtained employment with Coastline

Resources as a crane operator, where he continued to work at the time of the hearing. Claimant stated his position with Coastline Resources allows him to sit the majority of his 8 to 10 hour days, and pays over $11 an hour, admittedly more than his $8.50 an hour wages with Tesoro. Claimant stated that while he had been employed by Coastline Resources for two and half years, he testified he had experienced two lay-offs during that time.

Charlie Doer, Risk Manager

Mr. Charlie Doer, risk manager for Tesoro, testified that Tesoro provided its employees with a benefit package that included fringe medical benefits of a group medical plan and life insurance in addition to paid holidays and vacations. Upon viewing Employer's Exhibit 3, Mr. Doer identified it as an Mr. Castro's earnings record and explained that the column identified as "Earnings 5" reflected the amount Tesoro contributed to medical and life insurance for Mr. Castro. Additionally, Mr. Doer explained that the difference between the amount identified as the "voluntary deductions" column and the "Earnings 5" column equaled the total amount Claimant contributed towards his health and life insurance, which in Claimant's case totaled approximately $13.00 for every two week pay period.

Mr. Doer explained that an employee could choose not to participate in Employer's health insurance plan, but only if the employee offered proof that he was already covered by another medical insurance plan. If an employee succeeded in offering proof of other insurance, the employee would receive the difference between the "voluntary deductions" and "Earnings 5" column, in Claimant's case he would have received about $14.00 a pay period.

Mr. Doer stated the medical insurance plan did not function as a savings plan. Moreover, according to Mr. Doer, the amount of money reflected in the "Earnings 5" column is, in effect, not taxed. (CX 27).

Lawrence H. Wilk, M.D.

Dr. Lawrence Wilk, board certified orthopedic surgeon, testified by deposition on January 11, 2000, and his medical records were introduced into evidence. Dr. Wilk testified he first examined Claimant on October 24, 1997, at which time Claimant was complaining of pain in the arches of his feet and difficulty walking beginning around July 16, 1997. At that time Dr. Wilk opined Claimant was unable to return to work. Dr. Wilk stated that Claimant slowly improved and on April 13, 1998, he opined Claimant could increase his activities. By August 13, 1998, Dr. Wilk released Claimant to return to work with a prescription for arch supports and high-top lace boots. During the August, 1998 visit, Dr. Wilk assigned Claimant a 3% impairment rating to each foot and placed him at maximum medical improvement. The medical records indicate Claimant was last seen on January 25, 1999, reporting progress with the treatment program and that he continued to work. However, Dr. Wilk opined Claimant required a new pair of arch supports and boots. (CX 8, 9, 16, 20, 21, EX 1, 10).

Regarding causation of Claimant's plantar fascitis, Dr. Wilk opined that Claimant's complaints were caused by his work conditions with Employer, specifically, the number of hours Claimant was required to be on his feet. Dr. Wilk testified that Claimant was probably born with the flat feet condition, however, he explained that many who suffer the same condition are asymptomatic. Instead, he explained that, because of the flat feet, Claimant was more susceptible to plantar fascitis, or inflammation of the foot tissue. Dr. Wilk reasoned that Claimant's employment, which required an extensive amount of time ambulating, standing, and jumping, resulted in his arch pain and that Claimant would require continued future medical care in order to receive prescriptions for his arch supports, boots, and medication. Dr. Wilk testified that he did not place permanent restrictions on Claimant's functional abilities, but he recommended Claimant obtain employment which would not require such strenuous labor for fear Claimant's condition would again flare up in the future. (CX 8, 9, 16, 20, 21, EX 1, 10).

Medical Evidence

Brent Brotzman, M.D., P.A.

Dr. Brent Brotzman, board certified orthopedic surgeon, examined Claimant at Employer's request on December 10, 1997. Claimant reported pain in both feet associated with prolonged amounts of walking and standing. Dr. Brotzman's impression was that Claimant suffered from probable plantar fascitis of bilateral heels resulting from a combination of his flat foot condition as well as prolonged ambulation and standing. Additionally, Dr. Brotzman opined that Claimant's work may have caused or exacerbated his condition. Dr. Brotzman recommended Claimant obtain inserts, anti-inflammatories and a bone scan. In a letter dated April 6, 1999, Dr. Brotzman opined, after reviewing Claimant's medical records, that he reached maximum medical improvement on August 13, 1998. (CX 15, 24).

Other Evidence

Claimant's 1996 W-2 form, indicates he earned $23,477.85 in taxable wages and $3,666.70 in miscellaneous non-taxable compensation, for a total of $27,144.55. Wage records from Employer reported gross earnings of $38,962.27, without flex money, and indicate he worked 295 days in the year preceding his July, 1997, injury. Following Claimant's injury and termination, the records indicate Claimant was employed as a casual/temporary employee for M-I Drilling Fluids from September 12, 1997, through January 30, 1998, earning a total of $8,644.00. Claimant then obtained employment with Coastline Resources with wages from February, 1998, through August, 1999, for a total of 46 weeks of work, and total earnings of $20,623.44. (CX 25, 26, 31, 32, EX 3, 4, 5).

Findings of Fact and Conclusions of Law
Causation[3]

Section 20(a) of the Act provides Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

Based upon the evidence of record, I find Claimant has invoked the presumption that his 1997 plantar fascitis was the result of his work conditions while employed with Employer. First, Claimant's testimony established that he had not previously experienced foot difficulties prior to the development of the foot pain in spring and early summer, 1997, and that his position with Employer was his first employment position that required him to remain on his feet generally in excess of ten hours a day.

Additionally, both Drs. Wilk and Brotzman, the only physicians of record who examined Claimant, related his foot complaints to his working conditions which required that he stand, ambulate, and jump for the majority of his working hours, and both opined that Claimant's 1997 symptoms were exacerbations of Claimant's previously undiagnosed flat feet condition. Dr. Wilk opined that although Claimant was probably born with the condition of flat feet which made him more susceptible to plantar fascitis, Claimant's symptoms were caused by his work conditions, specifically, the number of hours Claimant was required to be on his feet. Moreover, Dr. Brotzman, who performed an independent evaluation of Claimant at Employer's request, opined that Claimant's plantar fascitis probably resulted from a combination of his flat foot condition as well as the prolonged ambulation and standing required by his job, and thus, that Claimant's work may have caused or exacerbated his condition. Consequently, because all the evidence of record supports a conclusion that Claimant's heavy duty position with Employer exacerbated Claimant's flat feet condition resulting in plantar fascitis, Claimant has met his section 20(a) presumption that his condition is employment related.

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[3] Although "causation" is listed as an issue to be decided by this court, both parties appear to be in agreement that Claimant's injury was caused, at least in part, by Claimant's work conditions. Employer's argument entitled "causation" is more accurately an argument regarding Employer's liability for future medicals and therefore, will be addressed as such. However, in an abundance of caution, this court has addressed the issue of causation as it was identified as a contested issue.

Having met his Section 20(a) presumption, the burden now shifts to Employer to rebut the presumption with substantial countervailing evidence. In this instance, Employer has provided no rebuttal evidence. Instead, both of the physicians of record have specifically related Claimant's condition, at least in part, to his job with Employer. Therefore, based upon the foregoing, it is this court's finding that Employer has failed to rebut Claimant's presumption with substantial countervailing evidence, and consequently, Claimant's plantar fascitis condition was work-related.

Average Weekly Wage

The first, and primary dispute regarding average weekly wage is whether or not money provided to Claimant in the form of a flex plan should be included as "wages" according to the Act. Under the Act's definition, a "wage" is a money rate received as compensation from an employer, for services rendered by the employee. This definition includes the reasonable value of any advantage received if: (1) the advantage either flows directly or indirectly from the employer to the employee; (2) the advantage is easily ascertainable or readily calculable; (3) taxes are withheld; and (4) the advantage is not considered a fringe benefit.

In this instance, the evidence reflects that the benefits provided through Employer's flex plan, in which Claimant participated, were fringe benefits under the Act as they covered costs of health and life insurance. See Morrison-Knudsen Const. Co. v. Director, OWCP, 461 U.S. 624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983); and 33 U.S.C. § 902(13). According to the testimony of Employer's risk manager, Mr. Charles Doerr, the flex plan acted to subsidize health and life insurance costs for employees. As described in Mr. Doerr's testimony, Employer provided a set dollar amount of health and life insurance benefits, $190.87 per two-week pay period, which would generally cover the entirety of health and life insurance costs of a single employee. However, if an employee chose to add family coverage to his health insurance, as Claimant elected to do in this instance, Employer's subsidy would fail to cover all the expenses. Instead, as in Claimant's case, the cost of family insurance coverage totaled $203.70 per two-week pay period. Therefore, Claimant was charged an additional $12.83 per two-week pay period ($203.70 - $190.87) to cover the additional expenses.

Furthermore, Mr. Doer specifically denied Claimant's allegation that the money placed into the flex plan could be used as a savings account if the employee so desired. Instead, all the testimony and record evidence establish that the money was to be used for subsidizing health and life insurance plans, whether provided by the Employer or obtained elsewhere.[4] Based upon this evidence it is clear

[4] The testimony additionally established that, had Claimant offered proof of other insurance coverage allowing him to opt out of Employer's health plan, he would have been provided with, approximately, an additional $14.00 a pay period. This court finds this testimony only offers further proof that Employer's flex plan was a fringe benefit intended to provide health insurance coverage to its employees. If Employer was not required to include an employee in Employer's health insurance plan because the employee had medical insurance elsewhere, Employer offered the additional money, in Claimant's case $14 a pay period, in an attempt to aid

to this court that Employer was providing Claimant a non-taxed, fringe benefit of health and life insurance through the offering of the flex plan, and as such, this court finds that this amount should not be included in the calculation of Claimant's average weekly wage. Consequently, based upon the wage records provided, this court finds Claimant earned $38,962.27 in wages in the year preceding his injury.

Having determined the portion of Claimant's earning which constitute "wages" in Claimant's case, this court must now resolve the issue of the appropriate computation of Claimant's average weekly wage. Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910(a)-(c). While Claimant argues Section 10(c) is most appropriate in this instance, this court finds that, instead, Section 10(a) is applicable as Claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and the wage records introduced into evidence include records supporting the specific number of days Claimant worked.

The formula delineated in 10(a) provides that in order to calculate Claimant's average weekly wage, Claimant's actual earnings for the 52 weeks preceding his injury are divided by the number of days Claimant actually worked during that period. In this case, based upon the wage records and the foregoing discussion, this court agrees with Employer's computations and finds that Claimant earned $38,962.27 in the year preceding his injury and worked 295 days during that period. Claimant's resulting daily wage of $132.08 is then multiplied by 300, since Claimant was a six day worker, and divided by 50[5], pursuant to Section 10(d), in order to compute Claimant's average weekly wage. Therefore, based upon this court's calculations, Claimant's average weekly wage at the time of the injury was $792.48.

Nature and Extent

In this instance, the parties have stipulated, and this court has found, that Claimant sustained on-the-job injury on July 16, 1997, when he developed plantar fascitis or tissue inflammation to both feet. The parties, however, disagree as to the nature and extent of Claimant's injuries. Specifically, Employer alleges that Claimant reached maximum medical improvement in March, 1998, and that his economic disability ended on February 13, 1998, when Claimant secured a crane operator position with Coastline Resources earning more than his pre-injury wages. Claimant, on the other hand, argues that he did not reach maximum medical improvement until August 13, 1998, and that his disability remained partial after he received employment with Coastline Resources as his earnings were not equivalent to his pre-injury wages. Additionally, Claimant argues that upon reaching maximum medical improvement he is entitled to a scheduled award under the Act.

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in subsidizing the employee's private health insurance costs.

[5] The parties stipulated that, because Claimant was out of work for two weeks during the 52 week period preceding his July, 1997, injury for an unrelated injury, Claimant's annual wages should be divided by 50 rather than 52, as specified in the Act. (Tr. pg. 6).

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A claimant's disability, if any, is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI), before that time the disability is temporary in nature. Id. at 60. The date of maximum medical improvement (MMI)is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

Based upon the evidence of record, this court agrees with Claimant and finds that Claimant reached maximum medical improvement on August 13, 1998. Both Drs. Wilk and Brotzman opined Claimant's MMI date was August 13, 1998, and although Dr. Wilk testified that, in hindsight, Claimant probably reached MMI as early as March, 1998, this court finds his original opinion during his evaluations of Claimant to be the most persuasive. As Dr. Wilk's original MMI date of August 13, 1998 comported with the date provided by Dr. Brotzman, the only other physician of record to examine Claimant, this court finds Claimant reached MMI on August 13, 1998, and thus, any disability after this date will be permanent in nature.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); N.O. (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). Issues relating to nature and extent do not benefit from the Section 20 presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

According to the testimony and medical records of Dr. Wilk, as of October 24, 1997, when he first examined Claimant, he opined Claimant was not able to return to employment which required 10 to 16 hours of standing, ambulating and jumping as did his position of rigger operator with Employer. Thus, as Dr. Wilk was Claimant's primary treating physician, and the only physician of record to offer an opinion regarding Claimant's functional abilities, this court finds Claimant was totally disabled as of July 16, 1997, as Claimant was incapable of returning to his previous employment position with Employer.

Having established a *prima facie* case of total disability, it is Employer's responsibility to demonstrate the availability of suitable alternative employment within the relevant community. N.O. (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 1566 (5th Cir. 1981). To establish suitable alternative employment, the employer does not have to find the claimant a specific job, but must show that there are jobs available within the claimant's physical and educational abilities, age, experience and geographic area which he could secure and perform if he diligently tried. Id. at 1041-42. If suitable alternative employment is shown, Claimant's disability becomes partial and his award is based on the difference between Claimant's average weekly wages before the injury and his wage-earning capacity after the injury. §908(e).

As no evidence of suitable alternative employment was offered until September 12, 1997, this court finds Claimant was temporary totally disabled from July 16, 1997, to September 11, 1997.

The evidence establishes that as of September 12, 1997, Claimant secured an employment position with M-I Drilling Fluids which lasted 20 weeks and paid Claimant total gross wages of $8,644.00, which this courts finds to be an accurate reflection of Claimant's wage earning capacity at the time. Because Claimant successfully performed the position and had no complaints of the position falling outside of his functional abilities, this court finds that Claimant's total disability should be reduced to partial as of September 12, 1997, and continuing until January 30, 1998, when Claimant's position with M-I ended. Based upon Claimant's wages during this period, Claimant's disability benefits shall be reduced during this time by his wage earning capacity of $432.20 a week.

Employer concedes that as of January 31, 1998, when Claimant's position with M-I ended, Claimant was once again totally disabled, until February 13, 1998, when he secured additional employment. Thus, as Claimant was unable to secure employment from January 31, 1998, through February 12, 1998, and because Employer failed to offer any evidence of suitable alternative employment during this time, Claimant's disability during this period is total.

On February 13, 1998, according to Claimant's testimony and the records submitted into evidence, Claimant secured a position with Coastline Resources, inc. as a crane operator, and had continued his employment with Coastline as of August 13, 1998, when Dr. Wilk opined Claimant was capable of returning to his previous functional level. As Claimant has testified that the position is within his functional abilities, this court finds his wages earned from Coastline Resources are an accurate reflection of Claimant's wage earning capacity. According to the records of evidence, Claimant earned $19,148.77 during the 48 weeks from September 12, 1997, to August 13, 1998, rendering a weekly wage earning capacity of $398.93. Therefore, this court finds that Claimant's temporary disability during this period continued as partial, and Claimant's disability should be reduced by his wage earning capacity of $398.93 a week.[6]

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[6] Although Claimant indicated in his testimony that he earned a higher hourly wage with Coastline Resources than he earned with Employer, because Coastline required Claimant to work fewer hours during the pay period, this court finds that Claimant continued to suffer a loss of wage earning capacity during his employment with Coastline Resources.

As Claimant was released by Dr. Wilk on August 13, 1998, to return to his previous employment position without restrictions, and because Claimant's termination from his employment position with Employer in July, 1997, was based upon reasons unrelated to the injury and not an issue in this case, Claimant's total disability ended as of August 13, 1998, when Claimant reached maximum medical improvement. Therefore, the only remaining issue regarding the extent of Claimant's injury is whether or not Claimant suffered from a permanent impairment.

Claimant argues that based upon Dr. Wilk's reports, he was assigned a 3% permanent impairment rating to each foot, and thus, Claimant is owed permanent disability accordingly. Employer, on the other hand, argues that Dr. Wilk's impairment rating was based upon loss of mobility which could be the result of Claimant's arthritic changes. This court fails to find Employer's argument persuasive.

Based upon Dr. Wilk's medical records and his testimony, he opined Claimant suffered from a 3% permanent impairment rating to each foot. Dr. Wilk testified that while the impairment rating was based partially on loss of motion, it was also based upon a variety of other factors. Moreover, Dr. Wilk opined that the impairment rating was permanent, and that degenerative changes to Claimant's feet would not later increase the impairment rating. Although Dr. Wilk reported that Claimant was basically asymptomatic as of his final evaluation of Claimant before his testimony, he continued to assert that Claimant's impairment rating had not changed. Because Dr. Wilk was the only physician of record to offer an opinion regarding whether Claimant suffered any permanent damage due to his July, 1997, aggravation of his flat feet condition, this court finds his uncontradicted testimony persuasive, and thus finds that Claimant suffered a permanent disability.

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268, 277 n.17, 14 BRBS 363 (1980) (hereinafter "PEPCO"); Davenport v. Daytona Marine and Boat Works, 16 BRBS 196, 199 (1984). Unless the worker is totally disabled, however, he is limited to the compensation provided by the appropriate schedule provision. Winston v. Ingalls Shipbuilding, 16 BRBS 168, 172 (1984). Thus, because Claimant's disability was no longer total as of his date of permanency, Claimant's permanent disability is limited to his scheduled award. Furthermore, where there is an injury to two separate scheduled body parts, as in this instance, the respective disabilities must be compensated under the schedules, with the awards running consecutively. PEPCO, 449 U.S. 268, 14 BRBS 363. Consequently, because Section 908(c)(4) of the Act specifies under the schedule a maximum of 205 weeks for a loss of use of a foot, Claimant's permanent partial award will be for 6.15 weeks for each foot based upon the 3% impairment rating provided by Dr. Wilk.

Claimant's Entitlement to Medical Benefits

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case

for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

In the instant matter, there is no dispute that Claimant's treatment of arch supports, work boots, and anti-inflammatories were initially reasonable and necessary in light of Claimant's injury. However, Employer argues its liability for medical expenses ended when Claimant's condition resolved and that it has no liability for preventative medical care.

Based upon the evidence of record, this court finds no support for Employer's argument, but instead finds Employer responsible for Claimant's continuing medical treatment including arch supports, work boots, and anti-inflammatories, as all have been deemed medically necessary by Dr. Wilk, Claimant's treating physician. Dr. Wilk's testimony, when read as a whole, clearly indicates that Claimant's work conditions while employed with Employer aggravated his flat feet condition causing the plantar fascitis with which Claimant suffered. Although Employer is correct that Dr. Wilk has opined that Claimant's inflammation has resolved, Dr. Wilk additionally explained that the resolution of Claimant's symptomatology is only temporary without the continuing treatment he has recommended. Although the evidence indicates that the arch supports and work boots would have prevented Claimant from suffering plantar fascitis had he been provided with them before beginning work with Employer, the evidence additionally indicates that, now that Claimant is post plantar fascitis, the supports and special boots have become a medical necessity.[7] Therefore, in light of the fact that Dr. Wilk has opined Claimant's prescriptions for work boots, arch supports, and anti-inflammatories are a medical necessity, this court finds Employer responsible for the cost of the continuing medical care related to Claimant's on-the-job injury of July 16, 1997.

Conclusion

Based upon the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following order:

Order

It is hereby **ORDERED** that:

1. Employer shall pay to Claimant compensation for his temporary total disability, from July 16, 1997, to September 11, 1997; and from January 31, 1998, to February 12, 1998, based upon the average weekly wage of $792.48;

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[7] Claimant testified that although in heavy duty labor employment positions generally an employee is required to purchase their own steel-toed boots, Claimant explained that the boots he is now required to wear due to his on-the-job injury of July, 1997, are different from those he previously purchased. Thus, this court understands that Claimant was medically required to purchase a different steel-toed boot, rendering Employer liable for the costs.

2. Employer shall pay to Claimant compensation for his temporary partial disability, from September 12, 1997, to January 30, 1998, based upon the average weekly wage of $792.48, reduced by his residual wage earning capacity of $432.20 a week;

3. Employer shall pay to Claimant compensation for his temporary partial disability, from February 13, 1998, to August 13, 1998, based upon the average weekly wage of $792.48, reduced by his residual wage earning capacity of $398.93 a week;

4. Employer shall pay to Claimant disability compensation in accordance with Section 8(c)(4) of the Act for a 3% impairment to his right foot based upon the average weekly wage of $792.48 per week for 6.15 weeks;[8]

5. Employer shall pay to Claimant disability compensation in accordance with Section 8(c)(4) of the Act for a 3% impairment to his left foot based upon the average weekly wage of $792.48 per week for 6.15 weeks;[9]

6. Pursuant to Section 7 of the Act, Employer shall be responsible for past and future reasonable and necessary medical expenses related to treatment of Claimant's July 16, 1997, on-the-job injury, including arch supports, work boots, and anti-inflammatories;

7. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984);

8. Counsel for Claimant, within 30 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 20 days to respond with objections thereto. See, 20 C.F.R. §702.132; and;

9. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

SO ORDERED.

RICHARD D. MILLS
Administrative Law Judge

RDM:ac

[8] Section 908(c)(4) of the Act specifies under the schedule a maximum of 205 weeks for a loss of use of a foot. The award of 6.15 weeks is based upon Claimant's impairment of 3%.

[9] See footnote 8 supra.